

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT M. WAGGY,)	
)	No. CV-07-181-CI
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION TO DISMISS WITHOUT
)	PREJUDICE
UNITED STATES OF AMERICA,)	
)	
Defendant.)	
)	

Before the court is Defendant's Motion to Rerote and Dismiss. (Ct. Rec. 24.) Plaintiff Robert Waggy is appearing pro se; Defendant is represented by Assistant United States Attorney Frank Wilson. On November 1, 2007, the parties consented to proceed before a magistrate judge. (Ct. Rec. 17.)

BACKGROUND

On May 11, 2007, Plaintiff filed claims in state court against Paul Nicholi, an employee of the United States Department of Veterans Affairs (VA), for negligence, outrage, false reporting and lending criminal assistance. Plaintiff complains that Mr. Nicholi was negligent in providing appropriate treatment for Plaintiff's service-connected disabilities. He also claims that in March 1997, Mr. Nicholi conspired illegally with child protective services (CPS) to have Plaintiff's daughter removed from his care. Plaintiff seeks damages of \$50,000,000. (Ct. Rec. 1.)

ORDER GRANTING DEFENDANT'S MOTION
TO DISMISS WITHOUT PREJUDICE - 1

1 A Notice of Removal to federal district court was filed in this
2 court on June 4, 2007; on June 13, 2007, James A. McDevitt, U.S.
3 Attorney, certified that Mr. Nicholi was acting "within the course
4 and scope of his federal employment with respect to the conduct
5 which forms the basis for Plaintiff's complaint." (Ct. Rec. 2.)
6 The United States of America was substituted as party by Order of
7 the court on September 10, 2007, and Mr. Nicholi was dismissed from
8 the action. (Ct. Rec. 10.)

9 On September 11, 2007, Defendant moved for dismissal of the
10 Complaint pursuant to FED. R. CIV. P. 12(b)(1), contending that
11 Plaintiff had failed to exhaust administrative remedies and,
12 therefore, the court lacked subject-matter jurisdiction. Defendant
13 also argued Plaintiff failed to state a claim upon which relief can
14 be granted, FED. R. CIV. P. 12(b)(6). (Ct. Rec. 11, 12.) Plaintiff
15 responded on September 27, 2007, and objected to dismissal, stating
16 since the case had been removed to federal court, (1) he is pursuing
17 federal administrative remedies as required by the Federal Torts
18 Claim Act, and (2) the statute of limitations did not apply because
19 the alleged denial of treatment is still occurring. (Ct. Rec. 16.)

20 On January 23, 2008, the court entered an Order (1) staying the
21 captioned matter for six months to allow Plaintiff to pursue
22 administrative remedies, (2) striking Defendant's Motion to Dismiss
23 (Ct. Rec. 11) with leave to renege, and (3) granting Plaintiff leave
24 to amend his Complaint. (Ct. Rec. 18, 19.) On April 8, 2008,
25 Plaintiff filed a Motion for a second stay of proceedings, and
26 requested leave to amend his complaint and request for relief. (Ct.

1 Rec. 20.) On May 1, 2008, the court granted Plaintiff's Motion for
2 additional time and extended the stay to **August 1, 2008**. The court,
3 however, directed there would be no additional stay or extension for
4 time unless agreed upon by the parties. (Ct. Rec. 23.) Plaintiff
5 did not file additional pleadings in support of his Complaint or an
6 amended complaint within the time frame allowed.

7 On August 14, 2008, Defendant filed the instant Motion to
8 dismiss and rene its Motion for Reconsideration, requesting
9 dismissal without prejudice pursuant to FED. R. CIV. P. 12(b)(1), for
10 failure to exhaust administrative remedies, and for failure to state
11 a claim upon which relief can be granted pursuant to FED R. CIV. P.
12 12 (b)(6). (Ct. Rec. 22, 24.)

13 Under the Federal Tort Claims Act, a claimant must exhaust all
14 available administrative remedies before initiating civil actions
15 against the United States. 28 U.S.C. § 2675(a). *Rooney v. United*
16 *States*, 634 F.2d 1238, 1241 (9th Cir. 1980). Tort claims against the
17 United States are barred unless presented to the appropriate federal
18 agency within two years after that claim accrues. Further, a tort
19 claim against the United States is "forever barred unless action is
20 begun within six months after the date of mailing . . . of notice of
21 final denial of the claim by the agency to which it was presented."
22 28 U.S.C. § 2401(b); *United States v. Kubrick*, 444 U.S. 111 (1979).

23 Recognizing the difficulty in determining when a medical
24 malpractice claim accrues for purposes of the FTCA statute of
25 limitations, the Ninth Circuit has held that where a claim is based
26 on failure to diagnose, warn or treat a patient for a pre-existing

1 condition, rather than a new injury, a claim accrues under § 2401(b)
2 when "the patient becomes aware or through the exercise of
3 reasonable diligence should have become aware of the development of
4 a pre-existing problem into a more serious condition." *Raddatz v.*
5 *United States*, 750 F.2d 791, 796 (9th Cir. 1984).

6 Here, Plaintiff has not presented evidence of exhaustion of the
7 administrative remedies as required, despite two stays granted in
8 these proceedings. Defendant reasonably requests the Motion be
9 dismissed **without prejudice** to refile if and when relevant
10 administrative remedies are exhausted. (Ct. Rec. 22 at 3.)
11 Accordingly.

12 **IT IS ORDERED:**

13 1. Defendant's Motion to Dismiss (Ct. Rec. 24) is **GRANTED**
14 **without prejudice**.

15 2. Absent a showing of good cause, the time during which this
16 matter was pending before this court upon removal by Defendant (June
17 4, 2008, until the entry of this Order) will not be counted in
18 calculating relevant statutes of limitations (or evaluating
19 exhaustion issues) that began to run prior to entry of this Order,
20 should it become necessary to revisit Plaintiff's claims.

21 The District Court Executive shall enter judgment for
22 **DEFENDANT**, forward copies of this Order to Plaintiff and counsel for
23 Defendant and close the file.

24 DATED October 8, 2008.

25
26 S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE

27 ORDER GRANTING DEFENDANT'S MOTION
28 TO DISMISS WITHOUT PREJUDICE - 4